APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1027

Burlington Northern, Santa Fe Railway Company,	*	
Appellant,	*	
v.	*	Appeal from the United States District Court for the Western
Janette M. Lohman, Director, Department of Revenue of the State of Missouri,	*	District of Missouri.
Appellee.	*	

Submitted: September 15, 1999

Filed: October 22, 1999

Before BEAM, HEANEY, and FAGG, Circuit Judges.

BEAM, Circuit Judge.

Burlington Northern Santa Fe Railway Company (Burlington Northern) appeals the district court's holding that the State of Missouri did not violate 49 U.S.C. § 11501(b)(4) of the Railroad Revitalization and Regulatory Reform Act (the 4-R Act) by discriminating against the railroads with sales and use taxes on fuel. Although we find the district

court seems to have used the proper comparison class, we find that it improperly reviewed the entire state tax structure to determine if discrimination had occurred. Accordingly, we reverse.

I. BACKGROUND

The State of Missouri imposes upon a vast number of Missouri businesses[1] either a sales or a use tax of 4.225 percent on the retail price of items purchased or consumed in the state. Burlington Northern is a common carrier by railroad engaged in interstate commerce operating in Missouri. Missouri imposes sales and use taxes on Burlington Northern for the diesel fuel and gasoline it purchases and consumes in the state, but its major competitors, trucks and barges, are exempt from such taxes under Missouri Annotated Statute §§ 142.362(9), 144.030(26) (1996 & Supp.1999). Trucks, however, are subject to a fuel excise tax of seventeen cents that is paid at the fuel pump. Barge lines apparently pay no similar taxes of any kind.

Burlington Northern stopped paying the taxes in 1995. It contends that the taxes violate the 4-R Act. Burlington Northern asserts that these taxes, as applied to fuel, are discriminatory because they treat the direct competitors of the railroads preferentially.

Burlington Northern filed this action in the district court for declaratory and injunctive relief. On motions for summary judgment, with both parties agreeing there are no material issues of fact, the court granted summary judgment to the state. Burlington Northern appeals, asserting that the district court was unclear in its choice of a comparison class

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[1]Presently the number is approximately 80,000.

and that it improperly found that the sales and use taxes as applied to fuel did not violate the 4-R Act.

II. DISCUSSION

The 4-R Act proscribes four taxing practices that "unreasonably burden and discriminate against interstate commerce." See 49 U.S.C. § 11501(b). First, railroad property may not be assessed at a higher ratio to its true market value than other commercial and industrial property. See 49 U.S.C. § 11501(b)(1). Second, a tax may not be levied on an assessment referred to in (b)(1). See 49 U.S.C. § 11501(b)(2). Third, a jurisdiction may not collect an *ad valorum* property tax on railroad property if the tax rate is higher than that for commercial and industrial property in the same jurisdiction. See 49 U.S.C. § 11501(b)(3). Fourth, Congress added a catchall provision that prevents the imposition of "another tax that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4). We must decide the proper comparison class for a nonproperty tax under the catchall provision and whether the entire state tax structure may be examined to determine if such a tax is discriminatory.

Under the first three subsections of the statute that deal exclusively with property taxes, Congress specifically provided a comparison class comprised of "other commercial and industrial property." 49 U.S.C. § 11501(b)(1-3). It did not provide such a comparison class for the catchall provision. See 49 U.S.C. § 11501(b)(4). Thus, there are two possible comparison classes to choose from: (1) the competitive mode class, which is comprised of the railroads's direct competitors, or (2) the "other commercial and industrial taxpayers" class furnished by the property tax subsections. See Atchison, Topeka & Santa Fe Ry. Co. v. Arizona, 78 F.3d 438, 441 (9th Cir.1996). With respect to the Missouri

sales and use taxes at issue here, we find that a comparison class of competitors is more appropriate.

This comparison class dilemma is the result of a statutory omission. The rules of statutory construction dictate that words should not be supplied to a statute when the words are purposefully omitted or when adding words would defeat the purpose of the statute. See id. at 445 (Nielsen, J., dissenting), see also 2A Norman J. Singer, Sutherland Statutory Construction: Statutes and Statutory Construction § 47.38 (5th ed. 1992). We find both of these reasons present with respect to the catchall provision.

First, Congress demonstrated that it knew how to provide for a specific comparison class when it wanted one as demonstrated by the three property tax provisions. Second, the purpose of the catchall was to prevent discriminatory taxation in any form and to cover a wide variety of taxing techniques. See Ogilvie v. State Bd. of Equalization, 657 F.2d 204, 210 (8th Cir.1981); Alabama Great Southern R.R. Co. v. Eagerton, 663 F.2d 1036, 1040 (11th Cir.1981).

Therefore, the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case.[2] The broader purpose of the 4-R Act, to restore the railroads's financial stability, also supports this

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[2]For example, in the property tax setting, the Supreme Court had to be mindful of the three property tax subsections when analyzing the thrust of the catchall It did not want to subvert the statutory plan by preventing the state from using a taxing technique under the catchall that would be permissible under one or more of the three property tax subsections. See Department of Revenue v. ACF Indus., Inc., 510 U.S. 332, 340-41 (1994).

reading. See Department of Revenue v. ACF Indus., Inc., 510 U.S. 332, 336 (1994). Stability cannot be restored without making the railroads competitive.

Considering both the statutory plan and the purpose of the statute, we assume Congress intended to omit a specific comparison class from the catchall. If Congress had wanted this subsection to have the same comparison class as the property tax subsections, and none other, it would have written it that way. See Arizona, 78 F.3d at 445 (Nielsen, J., dissenting). It did not.

In this case, the railroad companies are subject to a generally imposed nonproperty tax, while their direct competitors are not. If too broad of a comparison class is chosen, the railroads will be placed at a competitive disadvantage that would defeat the purpose of the statute--financial stability. See id.; see also Burlington Northern R.R. Co. v. Commissioner of Revenue, 509 N.W.2d 551, 553 (Minn.1993); Atchison, Topeka & Santa Fe Ry. Co. v. Bair, 338 N.W.2d 338, 346 (Iowa 1983). Additionally, "[t]he broad comparison class overlooks the obvious point that a tax imposed on rail carriers, but not on motor carriers [or water carriers], is discriminatory in the most basic sense of the word--it treats those engaged in an identical activity differently." Arizona, 78 F.3d at 446 (Nielsen, J., dissenting). Therefore, we hold that the proper comparison class for Missouri sales and use taxes is the competitive mode. Both sides agree that the railroads's competitors are barges and trucks.

We next address whether the tax is discriminatory. Burlington Northern argues that only the sales and use taxes should be taken into account to determine if those sales and use taxes are discriminatory. We agree. In Trailer Train Co. v. State Tax Comm'n, 929 F.2d 1300 (8th Cir.1991), we held

that a state's overall tax structure need not be examined under the 4-R Act even if fair taxing arrangements exist, such as taxing one business with property taxes and another with sales taxes, " 'because the actual fairness of those arrangements is too difficult and expensive to evaluate.' " Id. at 1303 (quoting Kansas City Southern Ry. v. McNamara, 817 F.2d 368, 375 (5th Cir.1987)). We thus look only at the sales and use tax with respect to fuel to see if discrimination has occurred. See Trailer Train, 929 F.2d at 1303. Within the competitive mode class, only railroads pay the tax. Barges and trucks are exempt. Accordingly, we hold that Missouri's sales and use tax on fuel violates the 4-R Act.

III. CONCLUSION

Therefore, we reverse the district court's holding that the tax did not discriminate and we remand to the district court with instructions to enter declaratory and injunctive relief in favor of Burlington Northern consistent with this opinion.

A true copy.

Attest:

CLERK U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,	)	
Plaintiff,	)	
v.	)	Case No. 97-4211-CV-C-5
JANETTE LOHMAN, Director, Department of Revenue of the State of Missouri,	)	
Defendant.	)	

ORDER

The issue in this case is whether Missouri's sales and use tax discriminates against railroads. Most businesses in Missouri, including railroads, pay this tax; however, the railroads' main competitors (trucks and barges) are exempt from it. Burlington Northern Santa Fe Railway Company ("BNSF") alleges that by giving these exemptions to their main competitors while imposing the tax on railroads, the State of Missouri has discriminated in violation of the Railroad Revitalization and Regulatory Reform Act ("the 4-R Act"), 49 U.S.C. §§ 11501 to 11502 (1997).

The Plaintiff brings this action against the Director of the Department of Revenue of the State of Missouri ("the Director"), and seeks injunctive and declaratory relief from the tax being levied, assessed, or collected. The Plaintiff also requests the Court to order the Defendant to pay its court

costs. Pending before the Court are fully-briefed cross motions for summary judgment. The parties agree that there are no material facts in dispute, and that the case is ripe for judgment as a matter of law. [*Compare* Def's Mot. at 1 *with* Pl's Opp. at 1].

I. Background

The State of Missouri imposes a sales tax on gross receipts from selling, leasing, or renting certain items at retail, or for providing certain taxable services. *See* MO.REV. STAT. § 144.020.1 (1997).

Missouri also imposes a use tax on items purchased in other states but consumed in Missouri. *See id.* §144.610. The rate for Missouri's sales and use tax is 4.225% of the assessed value of the item. *See id.* §§ 144.020(1) and 144.610.1 (1997). Most of the revenue from these taxes is deposited in the state general revenue fund, *see id.* § 144.700.1, but one cent per dollar is distributed to local public school districts, *see id.* § 144.700.1; § 144.701. Missouri businesses are subject to the tax unless they are specifically exempted from it, and approximately 80,000 businesses paid sales and use taxes to Missouri in 1997. [*Compare* Def.'s Mot., Uncontroverted Material Faces, ¶ 3, *with* Pl.'s Opp. at 1 ("BNSF does not dispute any of the facts contained in the Director's statement of uncontroverted material facts.")]

The sale and consumption of diesel fuel and gasoline may be subject either to sales and use taxes or to fuel excise taxes. Railroads pay sales and use taxes on their gasoline and diesel fuel. *See id.* §§ 142.010(6); 142.362(6). When diesel fuel and gasoline are used in motor vehicles, however, they are exempt from sales and use taxes and subject to the excise tax. *See id.* §§ 142.010(5)(1); 142.020.1; 142.362(9);

142.372. The excise tax on motor vehicle fuel is $0.17 per gallon. *See id.* §§ 142.025; 142.372. Revenues from the motor vehicle fuel tax are deposited into the state highway fund. *Id.* § 142.345.1.

Missouri also imposes sales and use taxes on aviation jet fuel. These taxes are capped at $1.5 million for interstate common carriers by air that have a "direct pay" agreement with the Missouri Department of Revenue. [*Compare* Compl. at ¶ 15 *with* Answer at ¶ 16]. Finally, an exemption to the sales and use taxes exists for ships, barges, or vessels that primarily transport property or workers on rivers when the fuel is delivered by the seller to the vessel while it is on the river.

Missouri has imposed sales and use taxes on BNSF's purchase and consumption of diesel fuel and gasoline used for rail transportation in Missouri. BNSF has not paid these taxes since 1995, asserting that the tax violated the 4-R Act. BNSF has also filed for a refund of the sales and use taxes it paid between March 1992 and February 1995. The Director denied this claim for a refund, and the Plaintiff has not asked this Court to grant it. BNSF alleges that Missouri's sales and use taxes are discriminatory because the State gives the railroads' competitors preferential tax treatment.

II. Summary Judgment Standard

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant who moves for summary judgment bears the burden of showing that there is no genuine issue of material fact for trial. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 256 (1986). When considering a motion for summary judgment, a court must scrutinize the evidence in the light most favorable to the nonmoving party and the nonmoving party "must be given the benefit of all reasonable inferences." *Mirax Chem. Prods. Corp. v. First Interstate Commercial Corp.*, 950 F.2d 566, 569 (8th Cir. 1991) (citation omitted). The main purpose of a motion for summary judgment, however, is to identify factually unsupported claims. If a plaintiff has the burden of proof at trial on a claim and the defendant has filed a motion for summary judgment, the plaintiff must identify admissible evidence sufficient to make a submissible case at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). If the plaintiff cannot identify such facts, the defendant is entitled to judgment as a matter of law. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 884 (1990) (quoting *Celotex*, 477 U.S. at 322, *cert. denied*, 484 U.S. 1066 (1998)).

To establish a genuine issue of fact sufficient to warrant trial, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*,475 U.S. 574, 586 (1986), *cert. denied*, 481 U.S. 1029 (1987). Instead, the nonmoving party bears the burden of setting forth specific facts showing there is a genuine issue for trial. *Anderson*, 477 U.S. at 248 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, *reh'g denied*, 393 U.S. 901 (1968).

III. Jurisdiction

Although the parties did not brief the issue of jurisdiction in their Motions, the Director did raise the issue of Eleventh Amendment immunity in her Answer. [¶¶ 39-40]. The Court will, therefore, address this issue before proceeding to the merits.

The Director's Answer alleges that this Court lacks subject matter jurisdiction to award declaratory or injunctive relief concerning taxes that have already been assessed but not yet collected. Because the Plaintiff brought this suit against the Director in her official capacity, the jurisdictional issue falls under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Generally, the Eleventh Amendment does not bar suits against such defendants for "prospective injunctive relief to prevent a continuing violation of federal law," but it does bar suits for retrospective relief. *See Green*, 474 U.S. at 68 (quoting *Ex parte Young*, 209 U.S. 123, 159 (1908)).

Because BNSF seeks relief from taxes that have been assessed but not yet collected, this Court must determine whether such relief would be prospective or retrospective. Although the Eleventh Amendment prohibits federal courts from awarding damages in a suit against state officers in their official capacities, it allows courts to enjoin the collection of unpaid taxes that have already been assessed. *See CSX Transp., Inc. v. Board of Pub. Works of State of W. Va.*, 138 F.3d 537 (4th Cir. 1998.). In *CSX Transportation*, state officials argued that because they had already assessed taxes on the plaintiff, an injunction under the 4-R Act against collecting the taxes would be retrospective relief. In effect, the injunction would function as a "disassessment." *Id.* at 541. The Fourth Circuit rejected this argument, reasoning:

> The Board in effect argues that an injunction against the future collection of illegal taxes is retrospective and unavailable merely because the state has already decided how much tax to collect, even though the money is still safely in a taxpayer's pocket. If we were to accept this argument, no injunction could issue pursuant to *Ex parte Young* if the action to be enjoined has already been decided

> upon by a state official. But, of course, plaintiffs have no way to know that they must sue to enjoin an official's action until after the official has decided to take that action. . . . It is of no import that the state officials have already decided how much money they want illegally to collect, nor that the state will have to expend its own funds to make up for the funds it was not allowed illegally to collect. The point is that future collection is illegal. Section 306 not only prohibits discriminatory tax assessments, but specifically prohibits the collection of any tax based upon such an assessment. *See* 49 U.S.C § 11501(b)(2). Injunctive relief is available under *Ex parte Young* to prevent such a future violation of federal law.

Id. at 542-43. For this reason, BNSF may proceed in their suit against the Director under the doctrine of *Ex parte Young*.

IV. Discussion

Congress passed the 4-R Act to revitalize the railroad industry at a time when the railroads were foundering. *See* S. Rep. No. 1483, 90th Cong., 2d Sess. 1 (1968). Congress noticed that one of the difficulties railroads faced was a lack of funds and determined that discriminatory state taxation had partially caused this problem. *See* S. Rep. No. 91-630, 91st Cong., 1st Sess. 1, 3 (1969). Section 306(1) of the Act protected railroads from discriminatory state taxation, forbidding states to:

> (c) Assess rail transportation property at a value that has a higher ratio to the true market value

of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(d) Levy or collect a tax on an assessment that may not be made under paragraph (a) of this subsection.

(e) Levy or collect an ad valorem property tax on rail transportation property at a rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(f) Impose any other tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

Pub. L. No. 94-210, 90 Stat. 31 at 54 (codified at 49 U.S.C § 11501(b) (1997).[1] Subsections (a), (b), and (c) of the statute prohibit discrimination in property taxes relative to other "commercial and industrial" taxpayers, while (d) forbids "any other tax that discriminates against a rail carrier." *Id.* The Plaintiff in this case proceeds under subsection (1)(d).

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[1]The Court uses the original language of § 306, rather than the codified version, pursuant to the Eighth Circuit's opinion in *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300, 1302 (8th Cir. 1991), *cert. denied*, 502 U.S. 856 (1991).

(a) The Comparison Class

The parties disagree about how discrimination under subsection (1)(d) of the statute should be measured. The Director insists that the relevant groups for comparison are railroads versus all other commercial and industrial taxpayers. BNSF urges the Court to compare railroads to their competitors. As noted above, the 4-R Act does not specifically address the appropriate comparison class for subsection (1)(d).

Generally, the courts have found commercial and industrial taxpayers to be the proper comparison class under subsection (1)(d). *See, e.g., Burlington Northern R.R. Co., Inc. v. Bair*, 60 F.3d 410, 413 (8th Cir. 1995), *cert. denied*, 516 U.S. 1113 (1996); *Trailer Train Co. v. Leuenberger*, 885 F.2d 415, 417 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989) (using this comparison class). Courts tend to use this class because it is the comparison class defined by Congress in subsections (a) to (c). *See Burlington Northern R.R. Co. v. Huddleston*, 94 F.3d 1413, 1417 (10th Cir. 1996) ("we can think of no sound reason why Congress did not intend the same class to be used in analyzing discrimination claims under subsection (1)(d)"); *accord Chesapeake and Ohio Ry. Co. v. Rose*, 651 F.Supp. 1463 (S.D.W.Va. 1985), *aff'd*, 809 F.2d 785 (4th Cir.1987).

Another reason to compare the taxation of railroads to that of commercial and industrial taxpayers lies in the legislative history of the statute. Congress prohibited discriminatory taxation of railroads because it believed that railroads lacked the political power to protect themselves from unfair taxes. *See Western Air Lines, Inc. v. Board of Equalization of State of S.D.*, 480 U.S. 123, 131 (1987). Congress saw that railroads were vulnerable to state legislatures because they were "'nonvoting, often nonresident,

targets for local taxation' who cannot easily remove themselves from the locality." *See id.* (quoting S. Rep. No. 91-630, p.3 (1969). To determine whether a legislature has discriminated against railroads, therefore, courts compare their tax treatment to that of a large group of taxpayers, including those who are politically powerful enough to protect their interests. *See Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368, 375 (5th Cir. 1987). If railroads are treated as well as most other commercial and industrial taxpayers, it is safe to assume that a state has not taken advantage of the railroads' political weakness to impose a discriminatory tax on them: "A large group of local taxpayers will have the political and economic power to protect itself against an unfair distribution of the tax burden. The class of [railroads and their competitors] is simply too small and too foreign to fulfill this function." *Id.*

There is also substantial support in the cases for comparing the tax treatment of railroads to that of other commercial and industrial taxpayers in those cases where a tax burdens railroads and their competitors more than commercial and industrial taxpayers. For example, a state violates the 4-R Act when it imposes a tax only on public utilities, including railroads, but not other commercial and industrial taxpayers. *See McNamara*, 817 F.2d at 375. Also, a state discriminates against railroads when it imposes a special tax on carriers of cargo and laborers that does not apply to other commercial and industrial taxpayers. *See Chesapeake and Ohio Ry. Co.*, 651 F. Supp. at 1466.

A slightly different question is presented in cases like this one, however, where railroads' competitors are allegedly taxed more favorably than both railroads and most other commercial and industrial taxpayers. Using commercial and industrial taxpayers as a comparison class in such cases would reveal no discrimination, because most commercial and

industrial taxpayers pay the same taxes as the railroads. Nevertheless, a tax that imposes greater burdens on railroads than on the railroad's competitors could have a negative impact on the financial health of the railroad. Not surprisingly, courts are divided on what comparison class to use in such cases. *Compare Atchison, Topeka & Santa Fe Ry. Co. v. Bair*, 338 N.W.2d 338, 346 (Iowa), *cert. denied*, 465 U.S. 1071 (1983) (holding that competitors were the correct comparison class) *with Atchison, Topeka and Santa Fe Ry. Co. v. State of Ariz.*, 78 F.3d 438 (9th Cir.), *cert. denied*, 117 S. Ct. 584 (1996) (holding that commercial and industrial taxpayers were the correct comparison class). Because of their similarity to this case, these precedents merit further consideration.

In *Bair*, the state imposed an excise tax solely on fuel used by railroads. *See* 338 N.W.2d at 341. The state allocated these funds to a state agency created to assist financially troubled rail carriers. *Id.* at 340. Because the tax was imposed on propulsion fuel used by railroads, the court compared it to the tax on propulsion fuel used by the railroads' competitors - trucks, barges, and airplanes. *Id.* at 346. The court reasoned, "the present excise tax must be nondiscriminatory compared with fuel taxes on any of these other modes so as to avoid a competitive disadvantage." *Id.*; *accord Burlington Northern R.R. Co. v. Comm'r of Rev.*, 509 N.W.2d 551, 553 (Minn.1993) (sales and use tax); *Burlington Northern R.R. Co. v. Triplett*, 682 F. Supp. 443, 445 (D. Minn. 1988) (applying *Bair*'s reasoning to a fuel tax case). The court found that the 4-R Act established a national policy to "foster competition among all carriers by railroads and other modes of transportation." *See id.* at 341 (quoting 45 U.S.C. § 801(b)(1) (1982 Supp.)). When Congress passed the Act, the railroad industry was foundering because of "too much track chasing too little traffic." *Id.* at 340. Congress responded by prohibiting discriminatory state taxation,

providing federal funding for railroad improvement, and helping railroads abandon unprofitable lines. *Id.* Because one of Congress' purposes in passing the 4-R Act was to make railroads more competitive with trucks, barges, and airplanes, it is likely that Congress intended to prohibit states from taxing railroads more than their competitors.

In *Atchison, Topeka & Santa Fe*, however, the court relied on legislative intent to reach the opposite result. *See* 78 F.3d at 442. In this case, a railroad argued that a state violated the 4-R Act by exempting motor fuel from its sales tax. *Id.* at 439. Motor fuel was taxed under a separate tax scheme, and the proceeds were used to improve roads. *Id.* at 439, 443. The court reasoned that Congress never intended to guarantee that railroads receive the most preferential tax treatment a state offers, but only to ensure that railroads were not taxed more than commercial and industrial taxpayers generally. *Id.* The court cited the Senate Report on the 4-R Act, which explained:

> This proposed antidiscrimination tax bill, which would be available to all common carriers engaged in interstate commerce, has the obvious merit of insuring that such carriers would receive equal treatment with other taxpayers subject to the same tax rates in accordance with applicable State law. The proposal in no way alters the freedom of the State to tax its taxpayers as in its discretion it deems best, so long as such carriers are accorded equal tax treatment with other taxpayers.

Id. at 442 (quoting S. Rep. No. 445, 87th Cong., 1st Sess. 465-66 (1961)). In light of this legislative history, the court reasoned that comparing railroads only to motor vehicles

would force the state to give railroads preferential treatment relative to other commercial and industrial taxpayers. *Id.* After all, commercial and industrial taxpayers were subject to the sales tax, and the railroad was asking for an exemption that only motor vehicles enjoyed. The court concluded that "[i]n order for railroad carriers to receive equal treatment with other taxpayers subject to the same tax law, they must be compared to all others subject to the tax in question, not just compared to motor carriers." *Id.*

It is possible, however, for Congress to have multiple goals in passing a statute. The legislative history of the 4-R Act shows that Congress intended to ensure equal taxation of railroads and commercial and industrial taxpayers. At the same time, Congress also intended to revitalize the railroad industry by making it more competitive with trucks, barges, and airplanes. It is these competing objectives that make it difficult to define the proper comparison class for evaluating claims under the 4-R Act. One way to harmonize these Congressional objectives is to determine if a railroad has been singled out from among its competitors for discriminatory taxation, while keeping in mind that Congress did not intend to require states to provide railroads with preferential tax treatment.

Like the states in *Bair* and *Atchison, Topeka & Santa Fe*, Missouri exempts motor fuel from its sales and use tax. Motor fuel is instead taxed at a higher rate and dedicated to improving roads. Missouri also imposes the tax on airplane fuel, but caps airlines' liability at $1.5 million in certain circumstances. Finally, Missouri exempts fuel delivered to barges on rivers from the tax. The Court will consider these issues in turn.

First, BNSF alleges that Missouri discriminates against it because the State sets aside revenue from taxes on motor

fuel for improving roads, but allocates funds from taxes on railroad fuel for general purposes. BNSF argues that these expenditures place railroads at a competitive disadvantage, because railroads pay the cost of maintaining their own tracks. How a state spends its tax revenues, however, is irrelevant to whether a tax is discriminatory under § 306. *See Trailer Train Co.*, 929 F.2d at 1303. In *Trailer Train Co.*, the Eighth Circuit held that "the use of the proceeds of a tax has no bearing on the question of whether a tax is discriminatory"; *accord Atchison, Topeka and Santa Fe Ry. Co.*, 78 F.3d at 443 (holding that "the 4-R Act reaches only tax burdens and not tax benefits," and rejecting railroads' argument that tax was discriminatory because taxes imposed on motor vehicles were used to repair roads). Furthermore, the tax on motor fuel is $0.17 per gallon, while the sales and use tax is only 4.225%. Assuming that fuel sells for one dollar per gallon, the tax rate on motor fuel is more than four times the rate on railroad fuel. BNSF has provided no documentation to show how a tax on trucks which is four times greater than the tax on railroads, actually works to the advantage of the trucking industry.

BNSF argues that the holding *Trailer Train Co.* only applies to cases where it is the state taxing authority which claims equality of burden even though a tax on its face discriminates against a railroad. The reasoning of the court in *Trailer Train Co.* does not permit such a narrow reading, given its emphasis on the need for bright line rules that promote "simple judicial administration." *Trailer Train Co.*, 929 F.2d at 1303. To evaluate the relative burden of fuel taxation on railroads versus trucks would require the Court to engage in a lengthy analysis of how state services support the railroads and the extent to which trucks actually benefit from

state dollars used to build roads.[2] This is exactly the kind of inquiry rejected by the Court in *Trailer Train Co.*, which focused instead of on the question of whether the tax statute was facially discriminatory. On its face, the Missouri fuel tax favors railroads when compared to the trucking industry.[3]

Next, the Court will consider the taxation of airlines. Airlines actually pay the same tax rate as railroads, but their annual liability is capped at $1.5 million if they enter a direct-pay agreement with the state. Because airlines and railroads shoulder very similar tax burdens, BNSF emphasizes that most of its competition comes from barges and motor vehicles. [*See* Report of William W. Whitehurst at 2-3]. Because BNSF itself states that airlines are not significant competitors with railroads, this Court considers the slight tax preference given to airlines to be insignificant as well. Furthermore, BNSF has failed to show that it or any railroad pays more than $1.5 million in fuel taxation which would be the only way in which the airlines would be at a competitive advantage over the railroad.

This leaves barges. Barges pay no sales and use tax on fuel when it is delivered to them on a river. The Court, having considered at length Congress' goals in passing the 4-R Act, finds that this difference in tax treatment is too

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[2]The federal government contributes to the construction of roads in Missouri.

[3]*Triplett*, having been decided before *Trailer Train Co.*, is no longer persuasive and the Supreme Court of Minnesota in *Burlington Northern R.R. Co.*, 509 N.W.2d at 553, apparently was unaware of *Trailer Train Co.*, since it cited only to *Triplett*. The Minnesota Supreme Court also noted that the inquiry under the 4-R Act should focus on whether the tax was facially discriminatory.

minimal to constitute illegal discrimination. This is not a case where railroads are placed at a disadvantage relative to all of their competitors or even relative to a number of their competitors. It is a case where BNSF seeks the same preferential treatment given to barges, a single competitor. *Compare Atchison, Topeka & Sante Fe*, 78 F.3d at 442. This is not a case where Missouri took advantage of BNSF's lack of political power to impose an unfair tax burden on the railroad. More than 80,000 taxpayers in Missouri, some of whom are undoubtedly politically powerful, pay the same sales and use tax rate as BNSF. *Compare McNamara*, 816 F.2d at 375.

The cases relied on by BNSF are distinguishable. In *Burlington Northern R.R. Co. v. City of Superior, Wis.*, 932 F.2d 185 (7th Cir. 1991) the Wisconsin tax in question clearly targeted railroads and was paid by no other entity in the state. *Ogilvie v. State Board of Equalization of State of N.D.*, 492 F. Supp. 446 (D.C.N.D. 1980), *aff'd*, 657 F.2d 204, *cert. denied*, 454 U.S. 1086 (1981) is distinguishable because it dealt with a tax system which imposed a higher assessment ratio on railroads than on any other taxpayer. Finally, *National R.R. Passenger Corp. v. State Bd. of Equalization of State of Cal.*, 652 F. Supp. 923 (N.D. Cal. 1986), involved a state use tax that applied only to passenger train cars, a narrow target indeed. None of these cases are factually analogous to the matter now before the Court.

The 4-R Act does not require a state to give railroads the best taxation deal that is given to any of its competitors or to any other small group of taxpayers. If that were the rule, then Congress substantially impaired the ability of the states to tax railroads. There will always be some group in every category of comparison constructed by BNSF that is being treated more favorably than the railroad. Perhaps the 4-R Act was a devious way for Congress to transfer to the

state a major share of the cost of revitalizing the railroads, but there is nothing in the statute that mandates that assumption and common sense suggests otherwise. Missouri's fuel tax scheme as applied to railroads does not violate the 4-R Act.

(b) Exemptions from a Generally Applicable Tax

There is a related reason why BNSF loses this case. The Supreme Court has held that exemptions from a generally applicable tax never constitute discrimination under the 4-R Act. *See Department of Rev. of Ore. v. ACF Indus., Inc.*, 510 U.S. 332, 343 (1994). In *ACF Industries*, the State of Oregon enforced an *ad valorem* property tax, but exempted "agricultural machinery and equipment; nonfarm business inventories; livestock; poultry; bees; fur bearing animals; and agricultural products in the possession of farmers." *Id.* at 335. ACF Industries claimed that, because railroads were not also given an exemption, Oregon's scheme violated subsection (1)(d) of the 4-R Act. *Id.* at 340. The Court noted that subsections (1)(a) to (c) forbid states from treating "commercial and industrial property" more favorably than railroad property. *Id.* The Court then looked to the definition of this term: "'commercial and industrial property' means property, other than transportation property and land used primarily for agricultural purposes of timber growing, devoted to a commercial or industrial use and subject to a property tax levy." *Id.* at 340 (quoting 49 U.S.C. § 11501(a)(4)). The Court found it significant that the definition of commercial and industrial property allowed states to tax railroad property at a higher rate than agricultural property. *Id.* The statute, therefore, did not classify this exemption as discriminatory. The Court also interpreted the phrase "subject to a property tax levy" to mean property that is actually taxed. *Id.* at 341 (reasoning that the phrase had

that meaning earlier in the statute, in subsection (1)(a)). The Court concluded that:

> Because property "subject to a property tax levy" means property that is taxed, the definition of "commercial and industrial property" excludes property that is exempt. Exempt property, then, is not part of the comparison class against which discrimination is measured under subsections [(1)(a)-(c)], and it follows that railroads may not challenge property tax exemptions under those provisions.

Id. at 342. Relying on this language in Subsection (1)(a), the Court concluded that exempt property was not part of the comparison class for suits under subsection (1)(d). The Court reasoned, "it would be illogical to conclude that Congress, having allowed the States to grant property tax exemptions in subsections [(1)(a)-(c)], would turn around and nullify its own choice in subsection (1)(d)." *Id.* The Court also relied on legislative history and principles of federalism to support this conclusion. *Id.* at 345.

Because "exemptions from a generally applicable tax" do not constitute discrimination under the 4-R Act, the Court must discern the difference between permissible exemptions and impermissible discrimination. ***ACF Industries*** does not permit a state to "exempt" all commercial and industrial property from taxation except that held by railroads. If sweeping exemptions "single out [railroads] for discriminatory treatment," then they violate the 4-R Act, ***ACF Indus.***, 510 U.S. at 346; *accord* ***Bair***, 60 F.3d at 413. (A tax is discriminatory if most taxpayers are exempt and only a small group is taxed.) In ***Bair***, for example, Iowa only taxed personal property if it is owned by public utilities. All other

personal property was exempt. *See id.* at 411-12. The *Bair* court explained Iowa was not exempting some property from a tax of general application, but rather singling out railroads and other public utilities for discriminatory treatment. *Id.* at 413.

Missouri's sales and use tax applies to more than 80,000 businesses in the state. BNSF would be hard-pressed to prove that "railroads - either alone or as a group - are the only commercial entities subject to [the tax]," or that they were "singled out for discriminatory treatment." *ACF Indus.*, 510 U.S. at 346. Missouri's sales and use tax is generally applicable. For this reason, the exceptions for airlines, barges, and motor vehicles do not constitute discrimination against railroads.

The Plaintiff seeks to distinguish *ACF Industries* away by pointing out that Missouri's tax is a sales and use tax, rather than a property tax. It argues that the Supreme Court's reasoning is limited to property tax cases because the Court reasoned that Congress would not have allowed exemptions in property taxes in subsections (a) to (c) and then prohibited them in subsection (d). While this was one of the Supreme Court's reasons why the 4-R Act did not prohibit states from granting exemptions from a generally applicable tax, it was not the only one. In upholding the States' power to grant tax exemptions, the Supreme Court relied in part on "[p]rinciples of federalism." *See ACF Indus.*, 510 U.S. at 345. The Court noted:

> Subsection [(1)(d)], like the hole of [§306, codified at] § 11503, sets limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty [citations omitted]. When determining the breadth of a federal statute

> that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope.

Id. Therefore, the Court reasoned, if Congress had intended to restrict the States' power to grant property tax exemptions, it should have done so explicitly. *Id.*

This logic applies with equal force to sales and use taxes. *See Atchison, Topeka and Santa Fe Ry. Co.*, 78 F.3d at 443. In *Atchison, Topeka and Santa Fe*, a railroad challenged a 5% tax on the sale of goods and services in Arizona. *Id.* at 339. Motor carriers were exempt from this tax because they were subject to a different tax scheme. *Id.* The Ninth Circuit, the only federal appellate court to rule on this issue, rejected the distinction between sales taxes and property taxes. *Id.* at 443. The court held that "because Congress did not explicitly prohibit states from carving out exemptions from their sales and use taxes, such exemptions are permissible." *Id.* at 443. For this reason, Missouri's exemption from its sales and use taxes do not violate § 306.

V. Conclusion

Accordingly, it is hereby

ORDERED that Defendant's Motion for Summary Judgment (Doc. #27) is GRANTED. It is further

ORDERED that Plaintiff's Motion for Summary Judgment (Doc. #30) is DENIED.

/s/ Nanette Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: 11-20-98
Kansas City, Missouri

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1027WMJC

Burlington Northern and Santa Fe Railway Company,
Appellant,

v.

Janette M. Lohman, Director, Department of Revenue of the State of Missouri,
Appellee.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 26, 1999

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit